Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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SUMMARY

Under current Commission practice, non-dominant carriers which file tariffs for their services, such as Sprint, are allowed to state in their tariffs maximum rates and provide discounts from those rates. The experience which the Commission has gained by allowing Sprint to operate under a maximum rate tariff regime provides sufficient justification for the Commission to formally codify such practice into its rules. Moreover, there is widespread agreement among the commenting parties that maximum rate or range rate tariffs would not be detrimental to consumers, that such tariffs are justified by the market challenges faces by non-dominant carriers and that the Commission has ample authority under the Act to regulate offerings of non-dominant carriers under a maximum rate or range rates tariff regime.

AT&T's arguments to the contrary are without merit. For example, although AT&T contends that maximum rate or range rate tariffs are contrary to the plain language of Section 203 because it says such language requires that all carriers without exception "specify" their "actual charges" in their public scheduled filed with the Commission. However, tariffs specify charges may fall below a certain rate or within a certain range. Moreover, such tariffs specify that carriers cannot be charged either rates above for the maximum outside the range.

In any case, the Commission has the discretion under Section 203 to modify any requirement of that Section. The

the Commission under Section 203 permits modifications, inter alia, as to the information contained in these tariffs.

AT&T's argument that maximum rate or range rate tariffs including, in particular, Sprint's maximum rate tariffs have already been found unlawful under the Communications Act by the D.C. Circuit in MCI v. FCC and in AT&T v. FCC is incorrect. Those cases cannot be read as holding that communications carriers are not allowed to provide services under maximum rate or a range of rates. That issue is not before the court in either case.

AT&T's reliance upon cases decided under the ICA is similarly misplaced. The courts have made clear that precedent arising under the ICA cannot automatically be applied to issues arising under the Communications Act.

Also without merit is AT&T argument that under a maximum rate or range rate tariff the Commission would not be able to enforce the requirements of the Act, particularly Section 202(a). Carriers without market power cannot successfully engage in the type of pricing behavior condemned by that Section. Thus, the Commission need not employ the same regulatory tools for such non-dominant carriers as it does for carriers with market power in order to ensure compliance with the Act.

Finally, the Commission should not adopt its rules to reduce the current notice period for non-dominant carriers from 14 days to 1 day. The 14-day notice period is not burdensome and does not hinder a carrier's ability to compete in the marketplace.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36
	)	

REPLY COMMENTS OF SPRINT

Sprint Communications Company L.P. ("Sprint") hereby respectfully submits its reply to the comments filed in response to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding (FCC 93-103, released February 19, 1993).

I. CONTRARY TO THE ARGUMENTS OF AT&T AND A FEW OTHERS, THE COMMISSION HAS THE AUTHORITY UNDER THE COMMUNICATIONS ACT TO CODIFY ITS PRACTICE OF ALLOWING NONDOMINANT CARRIERS TO FILE MAXIMUM RATES OR RATE RANGES IN THEIR TARIFFS.

Under current Commission practice, nondominant carriers which file tariffs for their services, such as Sprint, are allowed to state in their tariffs maximum rates and provide for discounts from those rates. Sprint introduced maximum rates into its tariffs in 1987 as a way for Sprint to meet the tariffing requirements of Section 203 while at the same time retaining the flexibility necessary to continue to engage in vigorous price competition with the dominant carrier in the market: AT&T. As explained in Sprint's Initial Comments (pp. 9-11), Sprint's tariffs have in no way hindered the Commission from performing its statutory responsibilities with respect to Sprint's offerings. Also, during this nearly 5 1/2 year period not one

customer has formally complained to the Commission that Sprint was charging rates for its common carrier services which contravened the requirements of either Section 201(b) or 202(a) of the Act.

The experience which the Commission has gained by allowing Sprint to operate under a maximum rate tariff regime provides sufficient justification for the Commission to formally codify such practice into its Rules. Moreover, there is widespread agreement among the parties filing comments in this proceeding that such codification is perhaps necessary in the wake of the decision by the Court of Appeals for the District of Columbia Circuit in AT&T v. FCC, 978 F. 2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993 invalidating the Commission's long-standing permissive detariffing policies. These commenters, representing a broad and diverse range of interests within the telecommunications business, also agree that maximum rate or range rate tariffs would not be detrimental to consumers; that such tariffs are justified by the market challenges faced by nondominant carriers; and that the Commission has ample authority under the Act to regulate the offerings of nondominant carriers under a maximum rate or range rate tariff regime (see, e.g., Ad Hoc Telecommunications Committee at 7; Information Technology Association of America at 3-6; International Communications Association at 2; McCaw Cellular Communications, Inc. at 3; MFS Communications Company at 10; Comptel at 7-11; Avis Rent A Car System at 3; and MCI Communications at 8-17).

The Commission's proposed codification is opposed principally by AT&T; by two of the Regional Bell Operating

Companies (Bell Atlantic and Nynex);[1] and by Mobile Marine Radio, a provider of international services.[2] Their arguments, however, cannot withstand scrutiny.

For example, although AT&T contends that maximum rate or range rate tariffs "are contrary to the plain language of Section 203" (Comments at 3), it cites no provision from Section 203 which unequivocally prohibits the Commission from allowing carriers to implement such tariffs. Instead, AT&T's argument here is premised upon its selective reading of language in Section 203 which it says requires that all carriers, without exception, "specify" their "actual charges" in their public schedules filed with the Commission (id. at 4; see also, Bell

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[1]Conversely, Ameritech, BellSouth and Southwestern Bell support the proposed codification. They maintain, however, that the Commission should eliminate its dominant/nondominant classification scheme and afford all carriers the ability to file maximum rate or range rate tariffs for their services which face competition (Ameritech at 1; BellSouth at 2; Southwestern Bell at 2). Similarly, the local operating company subsidiaries of Pacific Telesis argue that the filing of maximum rate and range rate tariffs would be unlawful unless all carriers providing allegedly competitive services are also allowed to file such tariffs (Comments of Pacific Bell and Nevada Bell at 16-17). Properly understood, the comments of these RBOCs seek to undo the Commission's long-standing dominant/nondominant classification regime and what the RBOCs regard as unlawful asymmetrical regulation. The Commission's dominant/nondominant carrier policies are totally beyond the scope of this rulemaking which is limited to the tariff filing rules for carriers classified as nondominant. In any case, the Commission's dominant/nondominant carrier regime is based upon solid legal and policy grounds (see, Competitive Carrier, First Report and Order, 85 FCC 2d 1 (1980)). To the extent that this regime constitutes "asymmetric" regulation, it is clear that such regulation is a necessary concomitant of asymmetric market power.

[2]The Commission's proposals do not apply to the international services of nondominant carriers. Such services remain subject to streamlined regulation (Notice at n. 12).

Atlantic at 9 and Nynex at 8). However, maximum rate and range rate tariffs are not inconsistent with the language relied upon by AT&T. Such tariffs "specify" that charges may fall below a particular rate or within a particular range and that customers cannot be charged rates either above the maximum or outside the range. The service must be provided to the customer in accordance with, and consistent with the limitations contained in the tariff. And, without cataloging every rate for every customer, a maximum rate or range rate tariff does provide the universe of "all charges" made available by the carrier "for itself and its connecting carriers for interstate and foreign wire or radio communication..." (Section 203(a)).

Whether such specificity is insufficient under Section 203(a) (as AT&T contends) must be considered in light of Section 203(b)(2) grants the Commission the authority "in its discretion and for good cause shown, [to] modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions...." The Second Circuit has expressly held that the discretion afforded the Commission under Section 203(b)(2) permits modifications "as to the form of, and information contained in, tariffs and the thirty day [now 120 day] notice provision (AT&T v. FCC, 487 F.2d 864, 879 (2nd. Cir. 1973) ("AT&T Special Permission"); AT&T v. FCC, 503 F.2d 612 (2nd Cir. 1974) ("AT&T Enlarged Notice")). The D.C. Circuit in MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) has concurred in this holding (at 1192) and has gone on to explain that the Commission could further streamline the regulation of nondominant carriers without

encountering any contrary congressional prescription" (at 1196). In fact, as interpreted by the Courts, the Commission may not invoke its modification powers in only two respects: to limit the

(b)(2).[3] Nonetheless, AT&T suggests that such authority is limited to deciding the form a carrier's tariffs should take and to reducing the notice period. Thus, AT&T argues that "[i]n contrast to the rate filing requirement, the form of tariffs and the notice period are matters as to which the Commission has considerable discretion" (Comments at 14, emphasis in original). The difficulty with AT&T's position here is that it is contrary to the plain meaning of the word "modify" which, as the D.C. Circuit explained in MCI v. FCC, is "defined as '[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce'" (765 F.2d at 1192 quoting Black's Law Dictionary 905 (5th ed. 1979)). It is also contrary to the holding of the Court in AT&T Enlarged Notice ("We can only conclude that the plain language employed [i.e., modify] was intended to mean what it says" 503 F.2d at 617).[4] And, it is contrary to the finding of the Court in AT&T Special Permission in which the Court made clear that the Commission's power to modify included the power to "modify" not only requirement of form, but, more generally, any "information contained in, tariffs" (487 F.2nd at 879).

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[3]Similarly, Bell Atlantic, Nynex and Mobile Marine, all of which argue that the Commission has no authority under the Act to allow nondominant carriers to implement maximum rate or range rate tariffs, have managed to overlook the Commission's modification authority contained in Section 203(b)(2).

[4]Indeed, subsequent to the the decision in the Enlarged Notice Case, Congress amended Section 203(b)(2) to provide for an 90 day notice period and to specifically prohibit the Commission from increasing such period (Public Law 94-376, approved August 4, 1976, 90 Stat. 1080).

Moreover, AT&T's suggestion that the Commission cannot invoke its modification authority to alter and limit the amount of information that a nondominant carrier must include in its tariffs is completely unsupported by the language of Section 203(b)(2) which does not qualify the Commission's power to modify a tariff except to forbid the Commission to extend the statutory notice period beyond 120 days. If Congress had intended other limitations on the Commission's modification authority (such as limiting such modification authority to matters of form) it presumably would have said so. Since Congress did not so limit the Commission's modification authority, such authority must be considered to extend to all modifications of Section 203 whether as to form, substance, information, etc.

Equally without merit is AT&T's argument that maximum rate or range rate tariffs, including, in particular, Sprint's maximum rate tariffs, have been already been found to be unlawful under the Communications Act by the D.C. Circuit in MCI v. FCC and in AT&T v. FCC (Comments at 3 and fn. 13). This issue was simply not before the Court in either case. Moreover, these cases did not, indeed could not, have addressed the lawfulness of Sprint's maximum rate tariffs. Sprint had not implemented its maximum rates until over two years after the Court issued its decision in MCI v. FCC and the decision on review in AT&T v. FCC involved the FCC's disposition of a complaint by AT&T against MCI not against Sprint (AT&T v. MCI, 7 FCC Rcd 807 (1992)). Unlike Sprint, MCI did not file maximum rate tariffs and, in fact, acknowledges that

its service was untariffed. Therefore, the issue of maximum rates could not, and did not, arise in AT&T v. FCC.[5]

Also misplaced is AT&T's reliance upon Regular Common Carrier Conf. v. United States, 793 F.2d 376 (D.C. Cir. 1986), Maislin Industries, U. S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) and the decisions issued by the Interstate Commerce Commission.[6] AT&T argues that these decisions eliminate "any doubt that the filing of only a maximum rate or a range of rates

Communications Act (See Sprint's Initial Comments at 6 n. 4 and cases cited therein).

For instance, the Court's decision in Regular Common Carrier was based upon the ICC's authority to modify the tariff requirements of the ICA which was different from and not as extensive as the modification authority granted the FCC under the

could not provide service at rates other than the filed rate. Thus, Maislin was basically an affirmation of the well-established regulatory policy known as the "filed rate doctrine." Maximum rate or range rate tariffs are not inconsistent with such doctrine since carriers which provide service at rates below the specified maximum or within the specified range are adhering to their filed tariffs. Although AT&T may desire additional specificity, there can be no argument that service which is below the maximum or within the range is not provided outside of or in violation of tariffed rates so as to give rise to "damages."[7]

Moreover, Maislin did not address the authority of the ICC under the tariff filing provisions of the ICA to allow maximum rate or range rate tariffs and, as discussed above, the ICC's authority under its Act is more limited than that given by

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[7]AT&T, citing Maislin, argues that maximum rate or range rate tariffs "could expose customers who relied upon such [tariffs] to claims that they are liable for the difference between their carrier's filed rate and the secret rate assessed under the unfiled agreement" (Comments at 11 n. 14). This argument is reflective of the kind of fear-mongering--through a letter writing campaign, through direct threats to customers and in other ways--which AT&T has been engaged in for many months now. AT&T's argument is entirely without merit. As discussed, Maislin did not involve the lawfulness of maximum or range rate tariffs. The rates filed below a stated maximum or within a range are not off-tariff or contrary to a filed rate. AT&T's only argument (and, as noted, even here AT&T is incorrect) is that the rate is not sufficiently specific. Although this may require the filing of a more specific rate, any such alleged lack of specificity clearly would not give rise to a claim by the filing carrier that it is entitled to a higher rate from the customer than that previously negotiated and covered by the tariff.

Congress to the FCC. Maislin, therefore, is simply inapposite to the issue in this proceeding.

Plainly, as set forth above in Sprint's Initial Comments in this proceeding, the Commission's proposal to codify its practice of allowing nondominant carriers to state in their tariffs maximum rates or a range of rates is well within the Commission's authority under the Act to adopt. Nonetheless, AT&T argues that under such proposal the Commission would not be able to enforce the other substantive provisions of the Act, particularly Section 202(a) (Comments at 12-13; see also, Bell Atlantic at 10; Nynex at 7; Mobile Marine at 8-9).[8]

What AT&T's argument here overlooks, but what is nonetheless perfectly obvious, is that under well-established economic principles, carriers without market power cannot successfully engage in the type of pricing behavior condemned by the

violating Section 202(a) of the Act. AT&T has yet to produce even a scintilla of evidence which so much as suggests that, as a nondominant carrier, Sprint could even engage in such behavior, let alone affirmatively demonstrate that Sprint had violated Section 202(a). In its counterclaim in E-91-63, AT&T has only alleged a "conditional" or "protective" claim in which is asserts that if AT&T, as a dominant carrier, is found to have violated Section 202(a) of the Act in its provision of VTNS service, then Sprint should likewise be found to be engaging in unlawful conduct under Section 202(a) in its provision of service under its maximum rate tariffs.

In any event, as noted above, in the over 5 1/2 years since Sprint implemented in maximum rate tariffs, not one customer has filed a formal complaint with the Commission challenging Sprint's rates for its common carrier services as unjustly discriminatory. It is such experience and not AT&T's often repeated--but never supported--musings about the possibility that Sprint or other nondominant carriers could be violating Section 202(a) of the Act which should guide the Commission in its deliberations here.

II. THERE IS NO NEED TO REDUCE THE CURRENT 14-DAY NOTICE PERIOD TO ONE DAY.

In its Initial Comments (pp. 15-16), Sprint urged that the Commission not adopt its proposal to reduce the current notice period for nondominant carriers from 14 days to one day. Sprint explained that, based upon its own experience, the 14-day notice period was not burdensome and did not hinder its ability to compete in the marketplace. Sprint also pointed out that, under

a one-day notice period, it would be extremely difficult for the Commission to prevent the tariff filing of a nondominant carrier from becoming effective in the unlikely event that such filing was patently unlawful.

Several of the comments, especially those submitted by customers or their representatives, also caution against the use of a one-day notice period for nondominant carrier tariff filings. As the Networks point out in their comments (at 4-5), "a one day notice period is so short that a customer obviously will not become aware of, much less have time to review, a tariff that affects the terms of its underlying contract or service plan." See, also International Communications Association at 2; Ad Hoc at 8-9. These parties express concern that through such filings nondominant carriers could abrogate long-term service commitments. They suggest a regime under which all tariff filings by nondominant carriers that could affect such long-term service plans either be automatically suspended or subject to a longer than one day notice period (e.g., Networks at 5-6; Ad Hoc at 11). Sprint suggests that instead of constructing such elaborate regulatory mechanisms, the interests of customers would be effectively served by retaining the current 14 notice period for the tariff filings of nondominant carriers. As stated, such notice period would give the Commission and any interested party sufficient opportunity to examine the tariffs of non-dominant carriers.

AT&T argues that the Commission may not lawfully limit its maximum streamlining proposals as to tariff form and tariff notice to nondominant carriers and that streamlined regulatory

treatment must also be applied to AT&T (Comments at 16). AT&T's argument here is the same one it has raised ever since the Commission first proposed, in 1979, to implement its dominant/nondominant regulatory structure. The Commission has repeatedly rejected the notion all carriers must be regulated the same regardless of the fact that such carriers differ in terms of market power and their ability to exploit such dominance to the detriment of the public.[9] AT&T's repetition of such argument here does not make it any more valid.

The fact is that AT&T continues to exercise significant market power in the provision of certain services (e.g., 800 service, MTS, IMTS, and operator services), and the Commission needs to scrutinize AT&T's offerings in order to ensure that AT&T does not abuse such market power. As Sprint pointed out in its Initial Comments (p. 16), AT&T's tariff filings have often encompassed a broad range of issues and have generated substantial controversy. For example, AT&T's Transmittal No. 4941 which proposed to increase the rates for AT&T's Tariff 12 customers who exercise their fresh look rights but still have

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[9]Most recently, the Commission denied AT&T's petition asking that the Commission extend the 800 and inbound bundling restriction imposed upon AT&T in by the Commission in its Report and Order in Competition in the Interstate Interexchange Marketplace (CC Docket No. 90-132), 6 FCC Rcd 5880 (1991). See Memorandum Opinion and Order on Reconsideration, FCC 93-170 (released April 15, 1993). The Commission explained that given AT&T's market power in the provision of 800 service, the bundling by AT&T of 800 service with other services "can have a significant negative impact in the marketplace" (at para. 10). Such consideration was not of concern with respect to the 800 services offered by AT&T's nondominant competitors (id. at para. 12).

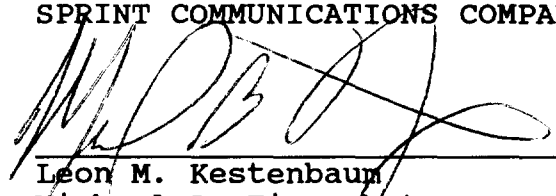
some traffic remaining on AT&T's network generate a number of petitions seeking suspension or rejection, including petitions from some of AT&T's Tariff 12 customers. In short, the Commission's application of dominant carrier regulation to AT&T remains fully justified and AT&T's contrary arguments are without merit.

III. CONCLUSION

For the reasons set forth above as well as in its Initial Comments, Sprint respectfully requests that the Commission adopt its proposal to codify its existing practice of allowing nondominant carriers to state their tariffs as maximum rates or range rates; permit nondominant carriers flexibility in the form their tariffs should take, including the flexibility to continue to file under current rules; and retain the 14-day notice period for non-dominant carrier tariff filings.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.



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April 19, 1993

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I hereby certify that a copy of the foregoing "Reply Comments of Sprint" was sent by first-class mail, postage prepaid, on this the 19th day of April, 1993, to the below-listed parties:

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